

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 396.

CECIL F. ADAMSON, Petitioner,

v.

DAVID C. GILLILAND.

STATEMENT OF THE CASE.

The sole point presented in this case is one of fact, to-wit: whether or not the defendant, Gilliland, has proved beyond a reasonable doubt that he produced a device embodying the subject-matter of the patent in suit prior to the date on which the petitioner, Adamson, first conceived the same and disclosed it to others.

The defendant admits making and selling devices identical with Figures 1 and 2 of the patent in suit, and admits that said device as used by him is within the scope of the various claims of the patent, except the defective claim 6 (Transcript, page 30).

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the defendant, Gilliland, had proved beyond a reasonable doubt that as early as August 7, 1911, he had produced vulcanizers embodying the construction of the patent in suit.

2. The Circuit Court of Appeals erred in holding

that the testimony given by Gilliland and by the witnesses on his behalf contained no inherent improbabilities.

3. The Circuit Court of Appeals erred in holding that the lower court had ruled that it was bound by a prior decree of the United States District Court for the Eastern District of Wisconsin, rendered in another case.

4. The Circuit Court of Appeals erred in holding that prior to the 19th day of August, 1911, the date on which the testimony shows that the idea embodied in the patent was disclosed by your petitioner, defendant had "sold" vulcanizers embodying all the elements of the petitioner's patent.

5. The Circuit Court of Appeals erred in failing to give due weight to the decision below on a question in fact after a trial in open court.

EVIDENCE ON BEHALF OF GILLILAND.

The story told by the defendant, Gilliland, as to the production of the vulcanizer cap, embodying the subject-matter of the invention in controversy, is somewhat remarkable. It appears from his own statement, given in open court, that during the latter part of July, 1911, one F. L. Huber, of St. Louis, practically suggested to him certain features of the device, that is to say, the application of the ears or lugs to the side of the cup and the disposal of the pins within the cup (Transcript, page 95). He then proceeded to reduce the invention to practice, taking about ten days to complete it, and on or about the 7th or 8th of August, 1911, had a number of articles cast from a pattern which he had made during these ten days, of which articles there are offered in evidence two samples (Defendant's Exhibits 10 and 15.) There is also in evidence a sample of the vulcani-

zer placed on the market by the petitioner, Adamson, in the early part of 1912 (Complainant's Exhibit 14), and it is a remarkable fact that the vulcanizer alleged to have been produced by Gilliland in August, 1911, is a replica of the vulcanizers afterwards produced by Adamson, except in one minor detail, that is to say, that the openings in the lugs on the sides of the cup face in opposite directions in the Gilliland exhibits, while in the Adamson exhibit they face in the same direction. As will be seen hereinafter from the testimony on behalf of Adamson, however, this disposition of the openings in the lugs by Adamson was adopted only after several hundred of his devices first had been placed on the market with the openings in the lugs **facing in opposite directions**. Now, it is inconceivable that two men even working along the same line and with the same object in view, could produce identically the same casting, each without knowledge of the other device. There is an irresistible conclusion either that Adamson in some manner obtained one of these castings alleged to have been made by Gilliland in August, 1911, and from it had his castings made, or that Gilliland made his original castings from one of Adamson's original devices, in which latter event it would have been impossible for Gilliland to produce his first castings prior to November, 1911, at the earliest.

The testimony of eighteen witnesses was offered to sustain the contention that Gilliland produced his exhibits 10 and 15 in the fore part of August, 1911.

Of these, **William Waldecker, Charles Haase, John Mirgain, Max Stephens, Jacob Dillman, August Schaefer and Henry Laundman**, all were employees of the South St. Louis Foundry Company, by whom the Gilliland Exhibits 10 and 15 are held to have been made, and all were employed as mechanics of one class or an-

other. Their testimony, for what it is worth, bears a remarkable similarity one to another, in that they all remember the incident in the vaguest sort of a way as having occurred in the summer time and during the hot weather. The transcript of testimony of these witnesses (Transcript, pages 47-56) discloses that the questions asked were of the most leading character, and practically dictated the answers that the witnesses gave. Furthermore, the witness Dillman was unable to fix even the year (Transcript, page 53), and the same is true as to the witness Shaefer (Transcript, page 54). It is to the testimony of these witnesses that the trial court unquestionably referred in the following comment made in the memorandum opinion rendered from the bench at the conclusion of the trial below (Transcript, page 100):

“There are some matters in this new testimony that do not favorably impress themselves. I know that a great many witnesses were examined and it is a singular thing that many of these molders and employees who were there at the time told virtually the same story one as the other, and each recollects the time about the same way each one of the others recollects it.”

In addition to this testimony, we have that of **Frederick N. Kilpatrick**, secretary of the South St. Louis foundry, by whom the castings for Gilliland were alleged to have been made in August, 1911. This witness fixes the time by means of a dray ticket, defendant's Exhibit A (Transcript, page 42), which he produced, and there was also produced a carbon copy of said dray ticket, which is in evidence as “Defendant's Exhibit B” (Transcript, page 42). It appears from the testimony of this witness that there was no entry of

this work made in the books of the South St. Louis foundry (Transcript, page 43), and the alleged reason for this was that it was a gratuitous job. But there is another and more important inconsistency in the mute testimony offered by these dray slips. An inspection of the same discloses that they had no red ink serial number thereon, whereas, according, to the testimony of **William C. Wurley**, bookkeeper and shipping clerk for the South St. Louis foundry (Transcript, page 63), the dray slips commonly in use at the South St. Louis foundry were numbered serially in red ink. In fact, a comparison of the dray slip, defendant's Exhibit A, and other dray slips, complainant's Exhibit 15 (Transcript, pages 64 and 65), discloses that they were printed on different paper and differ materially in detail. In other words, it is apparent that the dray slip, defendant's Exhibit A, was made out on a special form of blank, such as was not used ordinarily in the business of the South St. Louis foundry. No reasonable explanation is given as to this, and in view of the fact that the witness Kilpatrick fixes his date entirely from this dray slip, and of the fact that said dray slip is discredited by reason of its variation from the dray slips which were usually employed at that time at that foundry, it is not felt that the testimony of this witness can be given that credit which it would require to be a complete corroboration of evidence of Gilliland.

This brings us to the consideration of the testimony of **William C. Wurley**, the shipping clerk and time keeper of the South St. Louis foundry (Transcript, page 56). This witness is another who remembers the incident by the state of the weather, and further identifies the dray slips, defendant's Exhibits A and B. (Transcript, page 57), but in connection with these dray slips there appears in the testimony of this witness an im-

portant discrepancy. The witness is clear that when the slips were made out by Mr. Kilpatrick, he (Wurley) took the original and stuck it on a file on his desk (Transcript, page 62). Further the witness stated that Mr. Gilliland took the carbon copy when Mr. Kilpatrick tore off the two sheets. But it appears from the dray slips themselves that both original and duplicate were punched identically in the same manner, as admitted by this witness (Transcript, page 62). Nor could the witness give any explanation as to how this similar perforating of the two exhibits occurred (Transcript, page 63). This point may seem in itself of little moment, but when it is realized that it is our contention that this work was not done in August, 1911, any variation in the story of any material witness becomes of considerable importance. And in this connection, attention is called to the testimony of this witness Wurley in answer to certain cross-questions as to the presence or absence of base plates for these castings (Transcript, pages 59 to 61). Here the witness volunteered that there were plates for the bottoms of the castings, but afterwards admitted that he did not see such plates, but got his idea from the testimony of one Shanks.

It is thought that the testimony of this witness, like that of the witness Kilpatrick, cannot stand the test of proving beyond a reasonable doubt the contention of appellant.

The testimony of **John F. Shanks**, general foreman of the South St. Louis foundry, was offered, and inasmuch as he testifies that he did the actual casting work on these Gilliland castings (Transcript, page 46) his testimony should have been of considerable importance in corroborating the appellant. But in the same, we find a most remarkable discrepancy, and one which we feel destroys utterly the value of the testimony of this wit-

ness. The witness at the close of his testimony (Transcript, page 47) states that he made **an underplate** for each of the castings made for Mr. Gilliland at this time. Now, this is directly contrary to the testimony given by Gilliland, not only in this suit but in another suit under this patent, to which reference will be made hereinafter, and as admitted by Gilliland in his subsequent cross-examination (Transcript, page 85). In fact, the testimony of this witness, Shanks, is strongly corroborative of our contention, which is that these castings, which we admit were made **at some time** by the South St. Louis foundry, were made not earlier than November or December, 1911, and only after Gilliland had obtained possession of one of the first Adamson vulcanizers placed on the market, and which embodied a base plate, such as the witness, Shanks, declared was cast, and such as the appellant, Gilliland, asserts was not cast at that time.

Clarence L. Shephard testified that he turned off the bottoms of some castings for Gilliland, and that it was some time between August and October (Transcript, page 70), but his cross-examination is rather enlightening as showing certain vagueness of this witness as to this and other similar incidents.

Max Huhle, another witness for appellant, testified that he purchased one of these vulcanizers from Gilliland in September, 1911 (Transcript, page 71), but his cross-examination displays such an utter want of recollection as to other and more important incidents in his life, that it was impossible to credit his recollection on this point.

Herman Miller, another witness for appellant, testified that he loaned Gilliland a pipe vise and a pipe cutter, Aug. 8, 1911 (Transcript, page 68), and on or about the same time carried two sacks of castings for Gilliland

from the Kilpatrick foundry to Gilliland's house. He produces a dray ticket covering the loan of these articles, defendant's Exhibit H (Transcript, page 69), and seems to fix the date that he carried the castings for Gilliland by that dray slip. He states (Transcript, page 68), that he got a glimpse of the castings and judged that defendant's Exhibit 10 is one of them, or one similar. There is no direct connection between the loan of the pipe vise and the pipe cutter and the transportation of the castings, and it readily can be seen that in the lapse of time a disinterested witness easily may have confused his dates on this point. Furthermore, it is rather unusual that the dray slip, defendant's Exhibit H, should have been preserved so carefully until this time.

Appellant endeavors to fix his date by the testimony of other witnesses as to events which have no direct bearing upon the production of these castings.

William J. Baier, a witness for appellant, testifies as to the loan of a three-inch bit to Gilliland, which was delivered to Gilliland by his brother-in-law, Henry Spoeneman. However, it is to be noticed that Spoeneman was working for Baier at the time the bit was loaned, and that he quit the employment of Baier on July 3, and never worked there afterwards. Furthermore, he states that the bit was returned in about a week, or not over two weeks afterwards (Transcript, page 97).

Harry Spoeneman, the brother-in-law of Gilliland, testifies as to carrying the bit to Gilliland, and also testifies that he quit work for the Boehl Hardware Co., for whom the witness Baier worked, on July 3d (Transcript, page 98).

Now, according to the testimony of Gilliland, it was subsequent to July 25, 1911, that he had his conversation with Huber and then proceeded to make the pat-

tern for the vulcanizer. Such being the case, how is it possible for a bit borrowed July 3d and returned inside of two weeks to have figured in the making of this pattern? Manifestly, this bit could have had nothing to do with any work done by Gilliland subsequent to July 15th at the outside.

Spoeneman also testifies that he saw castings on the order of defendant's Exhibit 10 on Gilliland's tool bench in the basement of his house in August, 1911, but in view of his relationship to Gilliland, it is thought that this very vague statement can by no means be accepted as conclusive.

Respecting the testimony of **Ruth Gilliland**, the daughter of appellant (Transcript, page 98), it is felt that the same requires little comment. This witness was but nine years and one month old when she gave her deposition in January, 1914, and, therefore, was but about **seven and one-half years old** when the instances concerning which she testifies are alleged to have occurred. We feel that as corroborative evidence, this testimony can be given absolutely no weight.

Testimony was also offered by **John Schroer** (Transcript, page 74) and **William T. Mellow** (Transcript, page 96), as to the making of certain castings for Gilliland at the Liberty foundry, St. Louis, but inasmuch as this incident did not take place until January and February, 1912, and as the testimony shows, as will be pointed out hereinafter, that the appellee, Adamson, was on the market with his vulcanizers in November, 1911, it is not seen that this incident can have any bearing.

EVIDENCE ON BEHALF OF ADAMSON.

The story told by the appellee, **Cecil F. Adamson**, on the witness stand appears to be a plain and credible story of the acts of a true inventor, from the conception

and first crude sketches down to the production of the completed device, as follows:

The witness states that in the summer of 1911 he had a conception of the broad idea of this invention, and, believing that it would be necessary to use a quick-curing rubber gum, first experimented with rubber to produce the desired article, and, having succeeded, proceeded to develop the mechanical structure of the vulcanizer to completion. At that time, Adamson was general superintendent of the McGraw Tire & Rubber Co., at East Palestine, Ohio, and at the same time maintained an engineering office at Akron, Ohio, which was in charge of his assistant, **William E. McCormish**, who was in constant consultation with him, both by phone and by making trips to East Palestine, all during the summer of 1911. On August 19, 1911, Adamson explained to McCormish the principle of his invention, and illustrated the same by means of a series of sketches or drawings, in evidence as complainant's Exhibit No. 5 (Transcript, page 31). His explanation, as stated in his deposition (Transcript, page 32), related first to the figure marked "1" in the upper left-hand corner of said exhibit, by which he explained the principle of operation of the device; and this was followed by the making of Figures 2, 3, 4 and 5 of said exhibit, which he states were, in his view, practical embodiments of the idea. This sketch was signed and dated August 19, 1911, by Adamson, and was witnessed by McCormish, **Phyllis Gregory**, Adamson's sister-in-law, and **Charles Gregory**, his father-in-law, the explanation to McCormish having taken place at Adamson's residence, where the said witnesses, Phyllis and Charles Gregory also resided. McCormish was instructed to take this sketch to Akron and to have produced the construction shown in Figures 2 and 3, which illustrated what is known as the con-

centric-ring construction. McCormish returned to Akron, but on account of the press of other matters did nothing towards having the article made until Labor Day, 1911, when Adamson came to Akron on a visit. Upon learning that McCormish had done nothing, Adamson took the sketch back to East Palestine and immediately had a cup turned out in accordance with Figures 2 and 3, upon a lathe in the plant of the McGraw Tire & Rubber Co. He at once tested it out, but found there was great difficulty in igniting the gasoline, because of the space taken up by the rings, preventing access of oxygen to support combustion, and thereupon decided to cut out the rings and replace them with pins, which was done immediately. This was tested out and was found to produce the desired results in a most satisfactory manner. Adamson made further experiments with this device, as by changing the height of the rim of the cup, and having become satisfied with the construction, he made more complete drawings, in evidence as complainant's Exhibit No. 8 (Transcript, pages 34 and 35), which he gave to McCormish on the occasion of another visit of the latter to East Palestine, with instructions to have made a pattern and several castings in Akron. This McCormish did, some time in the early part of October, 1911, the pattern being made by the firm of Dietrich & Brunswick, pattern makers, Akron, Ohio, and the castings being made by the Taplin-Rice-Clerkin Co., Akron, Ohio. These devices McCormish sent to Adamson, and as they were found to be satisfactory, Adamson immediately made arrangements with the Ohio Foundry Co., of Cleveland, Ohio, to make castings in order that the article might be placed upon the market. The castings were completed and delivered to Adamson at East Palestine, and in November, 1911, were first placed on the market.

It will be observed by reference to complainant's Exhibit No. 8 that the slots in the lugs are turned in opposite directions, just as are the slots in the Gilliland Exhibits Nos. 10 and 15. There is also in evidence as complainant's Exhibit No. 9, the original pattern made by Dietrich & Brunswick in October, 1911, though said pattern does not contain the pins which were placed in it originally, said pins having been removed for the purpose of making a core box (Transcript, page 35). Said pattern also shows very clearly that the slots therein originally faced in opposite directions, as shown by the testimony of **Anthony J. Dietrich** and **Kenneth L. Douglas** (Transcript, pages 101 and 102 hereinafter to be referred to). There is also in evidence the original vulcanizer made by Adamson at East Palestine in September, 1911, the same being complainant's Exhibit No. 6, and the clamp used by Adamson in operating this vulcanizer, the same being complainant's Exhibit No. 7.

The testimony of Adamson in these particulars is most fully corroborated by the deposition of the following witnesses:

Anthony J. Dietrich testifies that he is a member of the firm of Dietrich & Brunswick, now The J. Dietrich Pattern Works, and that he made the patterns for Adamson in October, 1911, the same being billed Oct. 16, 1911, and that the slots faced in opposite directions (Transcript, pages 101 and 102).

Kenneth L. Douglas testifies that he was an employee of Dietrich & Brunswick in 1911, and did the actual work on the patterns, and testifies further that the slots in the lugs on this original pattern faced in opposite directions (Transcript, page 103).

P. J. Boylan testifies that he is secretary of the Taplin-Rice-Clerkin Co., Akron, Ohio, and that he made two small castings for Mr. McCormish, they being entered

under date October 12, 1911, and entered as being made for C. F. Adamson. He also testifies that they were made from a wood pattern painted black and furnished by Mr. McCormish, and that they looked the same as defendant's Exhibit 15.

William E. McCormish confirms in every particular the testimony of Mr. Adamson, as to the original sketch, complainant's Exhibit No. 5, the sketches, complainant's Exhibit No. 8, the wood pattern made by Dietrich & Brunswick, and the making of the two small castings by the Taplin-Rice-Clerkin Co. He further testifies as to the placing of the matter in the hands of the Ohio Foundry Co. and the making of the castings by that concern.

From this testimony there can be no doubt but that the story told by Adamson is corroborated in every particular, and that beginning August 19, 1911, he had a clear conception of this invention, and proceeded diligently to reduce it to practice, which was finally accomplished practically in commercial form the latter part of October, 1911, and was in November, 1911, placed on the market.

**GILLILAND HAD FULL KNOWLEDGE AS TO
THE DATES OF CONCEPTION AND RE-
DUCTION TO PRACTICE THAT
ADAMSON COULD PROVE.**

That this statement must be accepted as true is shown by the following facts:

In the transcript, page 37, is found a stipulation to the effect that the application of Adamson, which was filed October 25, 1911, was put in interference with a number of other applications, among which was one of William R. Major, of East Palestine, Ohio, and that on March 5, 1913, a final decision in favor of Adamson

and against Major was duly rendered by the Patent Office. In this interference testimony was taken on behalf of Adamson, and a full disclosure of all his dates as to conception and reduction to practice was made in said testimony. Said interference having terminated March 5, 1913, and the Adamson patent in suit having issued April 1, 1913, under the rules of the United States Patent Office the entire record of the interference was thrown open to the inspection of the public, so that it became a matter of public knowledge what dates could be shown by Adamson. We feel that this point is important because Gilliland has antedated Adamson only by about eleven days, as Adamson has proved a complete conception, the making of the drawings and a disclosure to others as early as August 19, 1911.

THE MISSING WITNESS, FERDINAND L. HUBER.

At the opening of trial of this case below, counsel for defendant stated that they had been trying to get **Ferdinand L. Huber** as a witness, but the marshal had not succeeded in serving him, and asked that a special effort be made to bring him into court (Transcript, page 19). It was also stated on behalf of complainant that they also desired the presence of this witness, and it was shown, further, that **Mr. A. M. Holcombe**, of counsel for appellant, spoke with this witness at his place of business in St. Louis on Friday or Saturday noon before the trial, which began the following Tuesday. (Transcript, page 99).

Now, this patent was adjudicated in the United States District Court for the Eastern District of Wisconsin before the Hon. Ferdinand A. Geiger, the month previous to this trial in the court below, and, as shown by this

record, testimony taken out of court of this witness, Ferdinand L. Huber, was presented and considered by Judge Geiger (Stipulation, Transcript, page 28), and, as shown by a certified copy of the opinion of Judge Geiger, offered in evidence (Transcript, page 26), this same defense was before Judge Geiger and was passed upon by him adversely, though commented on at some considerable length by him.

Surely, counsel for appellant must have realized the importance of this corroborative evidence of Huber, and being in touch with him as late as the Saturday before the trial, and with a subpoena issued, it seems strange indeed that he should have been permitted to leave the jurisdiction, as apparently he did. In fact, it was our earnest wish that this witness should be produced, as we were satisfied that he would not dare to tell the same story in open court as he told as a witness out of court. And we believe that the fact that he left the jurisdiction of the court below in order to escape the subpoena is conclusive that he did not dare to appear and repeat his earlier story. Flight is a confession of guilt, and we are satisfied that had this witness been produced the story that he would have been forced to tell would have borne little resemblance to anything corroborating the statements of Gilliland as to the incidents alleged to have taken place in July, 1911, between him and this witness.

There was also offered on behalf of the appellee, the testimony of **Melvin L. Huber**, a brother of Ferdinand L. Huber, who stated that his brother had not been at his place of business since Monday morning, and that he did not know where he was (Transcript, page 99). He also testifies that Mr. Vernia, a witness on behalf of appellee, had been looking for him on Monday, the day before the trial.

PRIOR ADJUDICATION OF PATENT IN SUIT.

As stated hereinbefore, this patent was adjudicated in December, 1911, in the United States District Court for the Eastern District of Wisconsin, in a suit entitled Cecil F. Adamson v. The C. A. Shaler Co., and notwithstanding that one of the defenses was this alleged prior invention on the part of Gilliland, the court, in its opinion, delivered from the bench at the conclusion of the trial, took occasion to state as follows:

"In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument, respecting the improbability of its truth." (Transcript, page 27).

Now, as shown by this record (Transcript, page 87), the appellant, Gilliland, not only gave his testimony in that suit by deposition, but also appeared in open court before Judge Geiger, and was cross-examined by counsel for complainant, and then interrogated at length by Judge Geiger himself, this deposition being produced **in extenso** in this record (Transcript, pages 87-96). Furthermore, the testimony of the missing witness, Ferdinand L. Huber, was before Judge Geiger, as well as the testimony of Max Huhle, Herman Miller, William C. Wurley, William T. Mellow, and Clarence L. Shephard, all of whom testified in open court in the court below, as well as five other witnesses not produced in the court below. Notwithstanding this array of witnesses, among whom was the much-sought-after Huber, Judge Geiger had no hesitancy in deciding that the story told by Gilliland was **inherently improbable**; that he had failed to corroborate in the manner that such statements usually are corroborated, by the pro-

duction of drawings, models, and more detailed description of failures which all men must have in the development of an idea, and for that reason could not and should not be accepted to the exclusion of a reasonable doubt as against the story given by Adamson.

THE BURDEN UPON THE APPELLANT.

It is elemental in the adjudication of letters patent that to overcome a granted patent by evidence offered to show prior public use, or a prior production of the invention in question, that the proof shall be such as to convince the court **beyond a reasonable doubt**; shall be such as would convict a defendant in a criminal case.

T. B. Woods Co. v. Valley Iron Works, 191 F., 196; 196 F., 780.

De Laval Separator Co. v. Iown Dairy Co., 194 F., 423.

Underwood Typewriter Co. v. Elliott-Fisher Co., 165 F., 927.

EFFECT OF A DECISION AS TO A QUESTION OF FACT AFTER A TRIAL IN OPEN COURT.

It has long been the practice in the federal courts to hold the finding of a Master as to a question of fact to be conclusive. So also the findings of fact by the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made.

The rule was laid down very clearly by the Supreme Court in *Davis v. Schwartz*, 155 U. S., 636. There Mr. Justice Brown, in stating the opinion of the court, held as follows:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we

think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat., Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, **or upon the credibility of witnesses**, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." (Black type ours.)

So also in *Kimberly v. Arms*, 129 U. S., 512, the court held as follows:

"Its (the court) findings, like those of independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given the evidence, or in the application of law, but not otherwise."

And this rule has been followed by the Circuit Courts of Appeals as shown by the ruling of the court in *Cook v. Robinson*, 194 F., 759, where the court stated as follows:

"The case having been tried without the intervention of a jury, the court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Prior to the adoption by the Supreme Court of the present New Equity Rules, testimony in equity cases was taken out of court, reduced to writing, and pre-

sented for the court's consideration, to find the facts as well as the law. Upon appeal, the complete record was sent up, and the Court of Appeals had the same opportunity, and identically the same evidence, as did the lower court upon which to predicate its judgment. But under the New Equity Rules whereby causes are tried in open court, and the witnesses are before the court for him to judge in person as to their credibility, equity cases take on a different aspect, in that while the trial judge has every opportunity to pass upon the credibility of the witnesses, the Court of Appeals is even less able than heretofore properly to weigh the same, in that under the new rules the transcript is not even a complete reproduction of the evidence, but is a brief of the same.

It would seem to follow, therefore, that the rule as laid down in the opinions hereinbefore quoted now should apply with equal force to questions of fact in equity cases as passed upon by the trial judge. He alone confronts the witnesses, and he is far better able to pass upon their credibility than would be a court of appeals, wherein a mere brief of the evidence given is submitted for consideration. We feel, therefore, that by analogy to the practice in the consideration of a Master's findings and by analogy to the practice in the consideration of findings of a lower court without reference to a jury as to questions of fact, the findings of fact of the court below, where all the witnesses have appeared before him and have given their testimony orally, should not be questioned.

CREDIBILITY OF TESTIMONY ON BEHALF OF PETITIONER.

Counsel for Gilliland, in the latter part of their brief, have commented upon the fact that the petitioner, Mr. Adamson, paid the sum of \$20,000 in order to get

rid of the interference proceedings filed by Major and backed by the McGraw Tire & Rubber Co. We believe that a consideration of the testimony of the petitioner, Mr. Adamson (Transcript, page 38), will explain very fully his position and the grounds for his action in this matter. As stated by him, his former employers, the McGraw Tire & Rubber Co., had provoked an interference and had gone on the market with the device. Testimony had been taken, and he (Adamson) was satisfied that he had proved priority, but was confronted by the fact that under the Patent Office procedure the issue of the patent to him could be delayed by appeals for several years. In the meantime the market was being glutted with infringements or copies of his device, as evidenced by the stipulation (Transcript, page 37), wherein there was offered in evidence about thirty-five separate clippings taken from various magazines published during the years 1912 and 1913, and disclosing forms of as many separate and distinct portable gasoline vulcanizers for tire tubes, all embodying, both structurally and functionally, the principle of operation disclosed in the patent in suit, said vulcanizers being offered for sale by various individuals, firms and corporations, widely scattered throughout the United States. The device of the patent in suit was of such character that if a return was to be had for his efforts, it was essential that he obtain his patent immediately in order to clear the field of these infringers, and naturally he decided that he had no alternative but to buy out the opposition of the McGraw Tire & Rubber Co., which he proceeded to do, at an excessive cost.

The criticism by counsel for appellant in their brief as to the testimony of appellee's witness, Vernia, is absurd. This witness, who was in the employ of Mr. Adamson, in his zeal to serve his employer, and know-

ing very well that if known as an employee of Adamson's he could obtain no information as to infringement, represented himself as from another firm. Furthermore, the testimony of this witness is purely collateral, and has no bearing upon the main points in the case, nor should his line of action, even if open to criticism, reflect upon the credibility of his employer, Adamson.

ERROR OF FACT.

It is with extreme regret that we call the attention of this Honorable Court to the fact that from the opinion rendered it is apparent that the United States Circuit Court of Appeals for the Eighth Circuit in preparing said opinion gave such scant attention to the actual facts developed in the case as to fall into an unmistakable error of fact in its decision. Thus, the opinion holds as follows:

"Those facts demonstrate beyond all reasonable doubt that the appellant used **and sold** a vulcanizer embodying all the features contained in appellant's patent, not only before the patent issued, **but even before the idea became definitely formed in appellee's mind.**" (Black type ours).

This is a plain error of fact in that there cannot be found any where in the testimony on behalf of defendant a single statement alleging a sale of one of these vulcanizers prior to August 19, 1911, the date upon which your petitioner first made a complete disclosure of the invention to others. In fact the testimony of defendant himself is clear that his first claim as to a sale is the one alleged to have been made to the witness, Max Huhle, in September, 1911, (Transcript, p. 71).

**ERROR OF LAW IN DECIDING THAT THE
LOWER COURT HELD THAT IT WAS
BOUND BY THE DECREE OF AN-
OTHER COURT IN ANOTHER
CASE.**

The opinion of the Circuit Court of Appeals contains the following statement:

“The lower court held that it was bound by the decree of the United States District Court for the Eastern District of Wisconsin, rendered in another case.”

This other case was one brought under the patent in suit by your petitioner against the C. A. Shaler Co., of Waupun, Wisconsin, and as a part of the defense this defendant, Gilliland, appeared in open court and gave testimony as to the defense set up in the present case, his testimony being accompanied by the testimony of quite a number of witnesses in the present case.

With respect to the ruling of the Circuit Court of Appeals that the lower court held that it was bound by this decree in the Eastern District of Wisconsin, the attention of this Honorable Court is called to the fact that the lower court in the present case expressed himself in the most positive terms as to the testimony offered before him. Thus, Judge Dyer, in commenting upon the decision of Judge Geiger, of Milwaukee, in the other case, stated as follows:

“My own judgment is that had all of this new testimony been before Judge Geiger when he decided the case, it is not of such character as would change Judge Geiger's opinion.”

There seems to be nothing more to be said on this point, for it is plain that the lower court in using such language has expressed his opinion in unmistakable terms as to the testimony offered before him.

CONCLUSION.

The two salient points to be borne in mind are:

1. That the vulcanizers alleged by Gilliland to have been made August 8, 1911, as evidenced by defendant's Exhibits 10 and 15, are identical in every particular with the first few hundred vulcanizers put on the market by the petitioner, Adamson, in November and December, 1911; from which fact it is inevitable that the conclusion be drawn either that Adamson saw one of Gilliland's vulcanizers and copied it, or that Gilliland did not make these vulcanizers until after he had obtained one of this first lot put on the market by Adamson.

2. But eleven days elapsed between the date alleged by Gilliland, August 8, 1911, and the date which Adamson has proved that he had a clear conception of this idea, had made sketches of the same, and had disclosed it to others, said date being shown by complainant's Exhibit No. 5, the sketch of August 19, 1911.

Adamson was a resident of East Palestine, Ohio, a town located on the extreme eastern border of the State, and but one-half mile from the Pennsylvania State line. Gilliland was a resident of St. Louis, Mo., the two places being practically four hundred miles apart. No evidence is offered by Gilliland that between August 8th and August 19th, he disposed of or circulated any of these vulcanizers, and it is inconceivable how Adamson could have obtained in that brief time any knowledge of what Gilliland had done, if he had actually made these vulcanizers. Neither of these parties, according to the evidence, was aware of the other's exist-

ence until the following year; and when it is borne in mind that the burden is upon the defendant, Gilliland, to prove his case beyond a reasonable doubt, it is felt that this mute circumstance alone militates so strongly against the truthfulness of his tale as to deprive it of any weight. To be plain, our contention is that Gilliland, sometime in December, 1911, or the first part of January, 1912, obtained one of the first of Adamson's vulcanizers placed on the market, one of the lot in which the openings in the lugs were turned in opposite directions, and either used it as a pattern at the South St. Louis foundry, or made a wooden pattern from it, which was used there.

The most vital witness that Gilliland presented, John F. Shanks, the man who states that he did the actual work in casting these Exhibits 10 and 15, differs radically from Gilliland in stating that he also cast base plates with the cups. We have no doubt but that he did, and we have no doubt but that Gilliland also copied the base plate of Adamson and furnished it to Shanks.

Counsel for appellant asks you to believe that the testimony of these numerous witnesses is conclusive as to the fact that Gilliland produced this vulcanizer in August, 1911. In reply thereto it seems sufficient to call the attention of the court to the language of Mr. Justice Brown in

Washburn & Moen Manf. Co. v. Beat 'Em All
Barbed Wire Co., 143 U. S., 275.

“ We have now to deal with certain unpatented devices claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, **their proneness to recollect things as the**

party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. The doctrine was laid down by this court in *Coffin v. Ogden*, 18 Wall., 120, 124, that 'the burden of proof rests upon him,' the defendant, 'and every reasonable doubt should be resolved against him.' (Black type ours.)

And this view of the matter is emphasized by the view taken by the trial court in the memorandum opinion rendered (Transcript, page 100), where he commented so unfavorably upon the manner in which the employees at the South St. Louis foundry, each told the same story as the other and each recollected the time about the same way that each one of the others recollected it. It is plain from this statement of the trial court, who had the very best opportunity to pass upon the credibility of these witnesses, that he was unfavorably impressed. And with this same defense before him,

Judge Geiger at Milwaukee took occasion to comment upon the **inherent improbability** of the story as told to him by Gilliland in open court. He commented further upon the lack of that corroboration that is usually found in cases of this character as to the initial steps taken by a true inventor and the failures met with before success is achieved, as follows (Transcript, page 28):

"That between the date which he gives, July 25th, and August 7th, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that these statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all men must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the story given by the complainant here."

Contrast this with his comment as to the testimony on behalf of the petitioner, Adamson, as follows (Transcript, page 27):

"He (Adamson) had a fund of information, some learning on the subject, which as between him and Gilliland, put him in a position where what he said respecting his achievements can be quite readily accepted and without suggestion of inherent improbability."

In view of the foregoing, it is submitted that the decision of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed, and that the decision of the lower court, and, in effect, the decision of the District Court at Milwaukee, should be sustained.

Respectfully,

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Of Counsel.